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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-806

TEXAS STEEL COMPANY, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 776

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT *776*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petitioner, Texas Steel Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on September 17, 1976.

OPINIONS BELOW

This dispute began in grievance and arbitration. The opinion of the arbitrator is reproduced at Appendix A, *infra*, pp. A-1 to A-28. The opinion of the United States District Court for the Northern District of Texas is unreported and is reproduced in Appendix B, *infra*, pp. A-29 to A-31. The opinion of the Court of Appeals is reported at 538 F.2d 1116. It is reproduced as Appendix C, *infra*, pp. A-32 to A-44.

The contract language at issue is reproduced as Appendix D, *infra*, pp. A-45 to A-47.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on September 17, 1976. This petition for certiorari was filed less than 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

The International Association of Machinists and Aerospace Workers, District 776 brought suit in federal district court against Texas Steel Company to enforce an arbitration award. The district court granted the plaintiff-union's motion for summary judgment and ordered the award enforced. On appeal the Court of Appeals affirmed. The questions presented for review are:

1. Whether the Court of Appeals for the Fifth Circuit erred in holding that, as a matter of law, the decision of the arbitrator was not arbitrary and capricious where the arbitrator's decision itself shows in his own words that he violated his duty as an arbitrator and went beyond simple interpretation of the collective bargaining agreement and entered into the actual management of the plant.

2. Whether the Court of Appeals for the Fifth Circuit erred in holding that on motion for summary judgment the district court was correct in applying the test of "arguable" or "presumptive" arbitrability to determine whether the dispute

was in fact arbitrable and thus placing the burden of proof on the non-movant.

3. Whether the Court of Appeals for the Fifth Circuit erred on the cross-appeal in holding that Petitioner's challenge to the arbitration award was without justification and remanding to the district court for a finding on justification and entry of attorneys fees, where the district court ordered each party to bear their own costs and where the Petitioner brought forth good faith arguments presenting genuine questions of federal labor law policy concerning the latitude and limitations to be given arbitrators and the use of the test of "arguable" arbitrability.

STATUTORY PROVISIONS INVOLVED

Section 185(a), Title 29, United States Code:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The facts relevant to consideration of the questions presented are uncontroverted and may be summarized as follows:

Texas Steel Company is a corporation located in Fort Worth, Texas, where it engages in the manufac-

ture of steel and the fabrication of steel products in interstate commerce. For purposes of collective bargaining, its employees are represented by District Lodge 776, International Association of Machinists and Aerospace Workers. Following the arbitration of a grievance, the Company refused to abide by the award and the Union filed suit in federal district court to enforce the award. Jurisdiction was based upon 28 U.S.C. Sec. 1331 and 29 U.S.C. Sec. 185. The district court granted summary judgment on the pleadings to the Union and this was affirmed on appeal.

The underlying industrial dispute, which was the subject of arbitration, involved A. J. Hurry, an employee of Texas Steel Company, who was the loadout leadman in the mill shipping yard of the Company. He complained that the Company was paying him less than the men whom he led contrary to the collective agreement and filed a grievance to that effect. As the leadman of the ground crew, Mr. Hurry was paid the contractual lead differential over these men. However, he felt that he was entitled to receive the lead differential over the rate paid the crane operators.

The differential rate for leadmen under the contract was $.20 per hour over the rate of the highest man led. The loadout men "A" were paid $2.95 per hour. The loadout leadman (Hurry) was paid $3.15 per hour. The crane operator was paid $3.38 per hour. See, Appendix D, *infra*, p. A-47.

The loadout ground crew consists of the loadout man "A" and three helpers. There are two such crews

each shift, one for each of two cranes. The loadout leadman assists the crews in their work and coordinates the work of the two crews. That work consists of unloading the mill of its product and loading trucks in the mill shipping yard. The leadman (Hurry) indicates to the loadout crews the nature and quantity of material to be moved, and the crews then place the material in position for the crane.

Prior to 1970 the two loadout men coordinated their crews' movements with each other. That year the Company established a non-supervisory position of Loadout Leadman. The new classification was established under the 1970-71 contract with the Union and continued unchanged into the 1971-72 contract. Hurry filed his grievance in January 1972. The grievance went to arbitration and the impartial member of the panel submitted an award on December 9, 1972. Following the hearing of additional testimony in July, 1973, the impartial member with the concurrence of the Union member, reissued the award of December 9, 1972, with a supplemental award appended to it on November 24, 1973. The Company member dissented. See, Appendix A, *infra*, pp. A-1 to A-28. The Company refused to comply with the award and this litigation ensued.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the principles governing an arbitrator's duty set forth by this Court in United Steel Workers v. Enterprise Wheel & Car Corporation.

Beginning with *United Steel Workers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960), federal courts have consistently stated that an arbitrator's role is confined to interpretation and application of a collective bargaining contract but that his decision will be disturbed and enforcement of his award refused only if his words manifest an infidelity to his duty to interpret and apply the contract. Although the lower federal courts repeat this rubric, it is rare when they find such infidelity. In the *Enterprise Wheel* case this Court held that a mere ambiguity in an award is not such an infidelity.

The award of the arbitrator in this case does manifest such an infidelity printed in black and white in words chosen by the arbitrator. After reviewing the arguments made by both sides concerning the function and duty of the loadout leadman the arbitrator stated that ". . . each party can marshall impeccable logic to support its case." Appendix A, *infra*, p. A-6. Having reached the conclusion that management had made a proper decision committed to it under Article III, Section 3, of the contract (Appendix D, *infra*, p. A-45), the arbitrator went on in the very next paragraph to state "It seems to the Arbitrator . . ." that the Company had made a mistake in the way it runs its plant and that in the interests of efficiency another

choice would have been better. This is the infidelity of which the law speaks and the arbitrator's own words impugn his decision.

The decisions of the courts below fly in the face of the arbitrator's patent intrusion into the operation of the plant and his departure from simple interpretation and application of the contract. Article III, Section 3, of the contract gives the Company certain unfettered rights and certain rights which are subject to limited review. (Appendix D, *infra*, p. A-45.) The right "to create new and additional job classifications for the jobs not already covered by provisions of this Agreement" is a management right subject to limited review through grievance and arbitration. However under the contract language, the arbitrator is confined to determining whether the position is new or already covered. Instead of making this determination, the arbitrator decided that the Company created the wrong position and should have denominated the new job as leadman of the crane operator and not leadman of the loadout crew and paid him accordingly. This is not a decision the arbitrator was empowered to make.

This is not a question of ambiguities. This arbitrator has clearly and explicitly stated that the Company has made an incorrect managerial decision. The Court should grant certiorari in this case because it presents a clear opportunity to make practical application of the language in *Enterprise Wheel* that the arbitrator "does not sit to dispense his own brand of industrial justice." 363 U.S. at 597. It is appropriate for this Court to elaborate the limitations placed on

arbitrators by *Enterprise Wheel* so that all can know the outer limits of their authority.

2. The decision below conflicts with decisions in other circuits limiting an arbitrator's authority.

As pointed out above, the contract in this case gave management the right to create new jobs so long as the jobs were not already covered by the agreement. This is exactly like the Company's authority to discipline or discharge for proper cause. The power lies in the Company. It can be reviewed, but only to determine the existence of proper cause. The choice of discipline is *not* grist for the arbitrator's mill. He can only decide whether cause for discipline existed. If he did more than this his action would amount to a modification of the collective agreement. Disciplinary clauses have received this interpretation in *Amanda Bent Bolt Company v. International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1549*, 451 F.2d 1277 (6 Cir. 1971); *Magnavox Co. of Tennessee v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO*, 410 F.2d 388 (6 Cir. 1969); Local 342, *United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO v. T.R.W., Inc.* 402 F.2d 727 (6 Cir. 1968); and *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Company*, 330 F.2d 562 (8 Cir. 1964). In *Amanda Bent Bolt*, supra, the appellate court held that an arbitrator's action in ordering the reinstatement with full seniority of workers who had engaged in a wild cat strike was contrary to the terms of the contract and beyond the

arbitrator's authority, where under the contract he had "no power to add to, subtract from or modify any of the terms of this agreement." 451 F.2d at 1280. A similar limitation on the arbitrator's jurisdiction is involved in this case and, for the reasons discussed, it should be given a like interpretation.

Likewise, in *Timken Company v. Local Union No. 1123, United Steelworkers of America, AFL-CIO*, 482 F.2d 1012 (6 Cir. 1973), an arbitrator was prohibited from modifying the collective bargaining contract. He was presented with a grievance of an employee whom the employer classified as a "voluntary quit" because he had been absent from work without authorization for seven consecutive days. He had been serving a jail sentence for traffic offenses. The arbitrator held the absence to be involuntary because the employee had no control of the situation and also held the employer to have discriminated between employees absent due to illness and those absent due to imprisonment. He ordered reinstatement. The district court refused enforcement of the award and the court of appeals affirmed on the theory that the arbitrator had exceeded his authority under the contract. He could only determine if the absence was "unauthorized". He was not empowered to redefine "voluntary quit" or to excuse absences. So it is here. The arbitrator cannot redefine or reclassify the "loadout leadman" to suit his own ideas on how to run a steel mill. He could only determine if the loadout leadman held a *new* job not previously subject to the agreement.

The court of appeals declined to follow the reasoning of the Sixth and Eighth circuits in the discipline cases

and apply it to the parallel situation presented here. The decision below conflicts with these decisions in other circuits and should be reviewed by this Court and reversed, because there is no good reason why a clause empowering management to create jobs should be given any different interpretation than a clause empowering management to discharge when the issue is the latitude given an arbitrator to review these management decisions.

3. The decisions below use an incorrect test to determine arbitrability, a test which results on summary judgment in the burden being placed upon the nonmovant and in the contract and the arbitrator's action being construed in the manner most favorable to the movant. This sets the summary judgment procedure on its head and deprives the parties of a judicial determination of substantive arbitrability.

The parties have bargained for the arbitrator's decision,[1] but only on those matters which are subjected to his review by the contract. The question of substantive arbitrability in a suit under Section 301, NLRA, 28 U.S.C. Sec. 185, is for the courts. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); Morris, The Developing Labor Law, pp. 482-483 (1971).

When deciding this question following arbitration the courts ought not to indulge in any presumptions as they do when arbitration is sought in the first instance. Different policies are involved. Where arbi-

[1]*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

tration is resisted federal law and policy favors arbitrations as a means of avoiding strikes.[2] Therefore, disputes are presumed to be arbitrable and arbitration is ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[3] This policy does not have any application where the parties arbitrate the matter in the first instance as here. The dispute has gone through the process of grievance and arbitration. The strike is avoided. Now a party which recognized its obligation to arbitrate even questionable matters looks to the courts to resolve the question of substantive arbitrability.

Because of the presumptive arbitrability rule of *Warrior & Gulf* the issue of real or substantive arbitrability cannot be raised without first exhausting the remedy of arbitration. After all, the result may favor the doubtful party. But having complied with the law and still being dissatisfied Texas Steel Company now seeks a judicial determination of substantive arbitrability as it is entitled to under *Atkinson v. Sinclair Refining Co., supra.* Instead it is met with the application of the test of presumptive arbitrability.

The parties have received the decision of the arbitrator. Now they are entitled to know if that decision was warranted and further whether the arbitrator exceeded his authority to interpret and apply the contract.

[2]"The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581 (1960).

[3]*Id.*, at 582-583.

The policy giving rise to the test of presumptive arbitrability no longer applies, but an even greater wrong occurs by its use on summary judgment. In this case the Union moved for summary judgment on the pleadings. By using the presumptive arbitrability test the district court construed the contract language and the arbitrator's actions in the light most favorable to the movant, when they should be construed in the light most favorable to the non-movant if the court is to determine whether the movant Union is entitled to judgment as a matter of law.

Viewed in the light most favorable to the Company, the contract and the arbitrator's award show that the arbitrator exceeded his authority in deciding the dispute in the manner chosen by him. He did not confine his decision to whether the Company created a new job or just dressed-up an old one as a subterfuge. He did not confine himself to interpretation of the contract, he exercised a management right and function to set the classification for a new job. Given that interpretation, the district court erred in granting summary judgment to the Union based upon a presumption of arbitrability.[4]

It is a peculiar rule indeed, approved by the court of appeals, which allows presumptions to support a motion for summary judgment.

The decision of the court of appeals should be reviewed to determine whether the test of presumptive arbitrability should be used where arbitration has occurred, and to fix the standard on summary judgment in suits to enforce arbitration awards.

[4]It should be pointed out here, as it was to the court of appeals, that the granting of summary judgment forestalled the Company from presenting a defense that the Union had ratified the Company's determination of the classification and pay of the leadman by agreeing to the 1971-72 contract.

4. The remand to the district court for a determination of justification and the finding of attorney's fees was unwarranted under the circumstances of this case.

Texas Steel Company does not quarrel with the proposition that costs and attorney's fees may be awarded in a proper case for enforcement of an arbitration award. However, this is not such a case.

In both the district and appellate courts, the Company has advanced reasons of law and policy based on sound precedents why the arbitrator exceeded his authority and why the district court erred in its ruling given the procedural posture of the case. The district court, although presented with the Union's request for attorney's fees apparently found no basis in fact on which to grant the relief. The Union requested no finding on the issue of justification, and the district court's order on attorney's fees is an implied finding that the Company's position while erroneous was not devoid of justification. The issues raised on appeal were complex enough that an appeal filed in January of 1975 was not argued until April 6, 1976, and not decided until September 17, 1976. Obviously part of this delay was caused by the heavy docket of the Fifth Circuit and the rightful preference given to criminal appeals. However, the time spent on the case by the

parties and the courts is not attributable to specious or frivolous arguments, but by a challenge based upon conviction and supported by defensible analysis that this arbitrator overstepped his bounds and that the district court erred in granting summary judgment.

Texas Steel Company has tried to bring forth questions pertaining to the proper role of arbitrators under the National Labor Relations Act. If it is wrong, then so be it, but the positions are advanced sincerely and not with a view towards wasting time and thwarting the peaceful resolution of labor disputes. The district court perceived this and acted within its sound discretion when it ruled on attorney's fees. The court of appeals should not have vacated that ruling.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX "A"

ARBITRATION AWARD, SUPPLEMENTAL ARBITRATION AWARD, AND DISSENTING OPINION

In the matter of
THE TEXAS STEEL COMPANY
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Local No. 776

File No. 72A/6390
October 18, 1972
Fort Worth, Texas

Arbitration Panel:
Ralph C. Barnhart, Impartial Member
Harold E. Mueller, For the Company
J. E. Floyd For the Union

ARBITRATION AWARD

On December 9, 1972, the impartial member of the Arbitration Panel submitted the following as the proposed award in the above-numbered arbitration, which proposed award sets out the nature of the grievance and the issue before the Arbitration Panel:

The grievance in this case complains that the Company is working a leadman, Mr. A. J. Hurry, at a lower rate of pay than provided by the collective bargaining agreement, Appendix A, pg. 43, of the Agreement dated November 21, 1971. The provision is that:

"Leadman classification shall be at least $.20 above the highest led classification rate. The Grievant, Mr. Hurry, was made a Leadman on November 30, 1970, in the load out crews in the Shipping Yard of the Company plant. The highest classification of those working on the ground in the Shipping Yard is Loadout Man "A" which was the classification in which Mr. Hurry was working prior to his designation as leadman. The Company has been paying Mr. Hurry $3.15 per hour or 20¢ per hour above the Loadout Man "A" contract rate. Mr. Hurry's complaint is that he is actually leadman for the entire loading crews which include also the Crane Operators who man the overhead cranes in the Shipping Yard. These operators have the classification of "Crane Opr. "A.O.H." with an hourly rate of $3.38. Mr. Hurry claims that he should, under the provision quoted, be paid $3.58 per hour, or 20¢ per hour over the Crane Operator "A" rate of $3.38.

The Company disputes Grievant Hurry's claim that he is leadman for the Crane Operators in the Shipping Yard and the issue before the panel is essentially whether Grievant Hurry does in fact serve as leadman to the Crane Operators as well as the ground crews.

It was Agreed at the hearing that a leadman at Texas Steel Company is not a supervisor but is a working member of the work force. The Union does not claim supervisory status for Mr. Hurry.

The Shipping Yard is an open area serviced by a craneway 300 feet long. Two overhead cranes with a span of 100 feet, operate on the craneway, each crane operating independently of the other. At one end of the

Shipping Yard, product from the rolling mill is moved by crane to storage bays or other areas and at the other end the product is loaded by crane on trucks and cars. A ground crew works with each crane, consisting of a Loadout Man "A" and three helpers, with the leadman working with both crews. The same pattern is followed for two shifts, on the third or graveyard shift there are two rather than three helpers for each crew. Each crane operates with one operator so that eleven men are working in the Shipping Yard on two shifts and nine on the graveyard shift.

Before Mr. Hurry was made a leadman he was a loadman "A" on one of the ground crews. The Executive Vice President of the Company, Mr. Will Wilson, testified that it was decided to put a leadman on each shift in the Shipping Yard because not only was the work load increasing but it was anticipated that it would increase further. The leadman was added "for the purpose of looking after the Loadout Man "A" and his helpers and to coordinate better the work load."

Mr. Hurry testified that as leadman he gets his orders from supervision as to what is to be loaded out and tells the loadout crew what to load on the trucks. Since the trucks can be loaded only by use of the crane it is equally necessary for him to give orders to the crane operator. In other words, the ground crew and the crane operator operate as a unit and the function of the leadman applies to one as well as to the other. On the mill end it is necessary to keep the product moved from the mill as it comes from the mill in order to keep the mill from shutting down. If necessary the leadman will

order both cranes to the mill in order to move the product accumulating from the mill. Again, it may be necessary to move both cranes to the loading end if the work demands. Mr. Hurry testified that as leadman he has to keep abreast of the work and he alone is in a position to place men and cranes where needed at any given time to get the work done. He stated that he is not a supervisor but he has been placed in the position to exercise the responsibility of keeping the work moving and while he could call upon supervision to give the specific orders he considers that supervision expects him to perform this function. In his words, ground crews and crane operators work as units and he, as leadman, cannot lead one part of this unit without leading the other. Mr. Hurry testified that as leadman he determines the course of operations during the day for both ground crews and for the crane operators who work with them. For example, when one crew goes to lunch while the other crew may work and then the latter goes to eat when the former returns, he testified that as leadman he makes the decisions as to such matters, that he might go to his supervisor but the supervisor could hardly help him because he (Hurry) knows the shape the work is in and the supervisor doesn't so that he alone is in a position to make a rational decision.

One of the crane operators, Mr. L. E. Ainsworth, testified that as Crane Operator he looks to the leadman for directions as to his work, when he takes his breaks, and on one occasion when the crews were working on Saturday and an emergency required him (the Crane Operator) to go home, there being no supervisors in the office, he checked with Mr. Hurry and "he let me go home." It was agreed that the other crane operator would testify to the same effect if called.

Mr. Wilson, for the Company, testified as noted above, that the loadout leadman classification was set up because of the increase of volume of work in the yard. The position was set up "to lead the ground crew and not to be a leadman over the crane operators." He stated that the crane operators are the highest paid employees in the yard and perfectly capable of making decisions of their own and that the work they do and the directions they receive from members of the ground crews are no different now than before the loadout leadman's position was created. According to Mr. Wilson, the loadout leadman position position is just an expansion of the job of the Loadout Man "A", the leadman's job "is really no more than to coordinate two groups rather than having loadout men "As" operate independently of each other."

The Company reasons that the crane operators perform now as they did before the loadout leadmen position was created and that no direction from the leadman as such is required. The Company sees the situation as one of "non-supervisory employees working together harmoniously to accomplish a common end." The Company emphasizes that the creation of a loadout leadman position was a management function and that in the exercise of that function the leadman's position was given no lead function with respect to the crane operators. The Company loadout leadman is part of the Loadout Man "A" classification still.

The Union position can be stated as one of viewing the work of the loading crews as work of an integrated team of ground crew and crane operator. Unless both ground crew and crane operators work together, neither can work at all. A leadman coordinating the work of the two ground crews in the yard necessarily coordinates the work of the crane operators inasmuch as all of the work that is done is accomplished by the crane moving and placing the steel product rigged by the ground crews.

It is obvious that the resolution of the issue here is not one that can come about through logical analysis for each part can marshall impeccable logic to support its case. The difference between the parties arises not from faulty logic on the part of one or the other but from the different points of view from which each party sees the situation. The Company sees the leadman's position as a management creation limited and circumscribed by the intentions and will of its creator. In such light the leadman's authority can rise no higher than its source wills. Like an agent charged by his principal to buy a white horse, he can claim no authority to buy one that is black. The Union from its position sees the situation from a more functional or pragmatic point of view. If the ground crew and the crane operator cannot work without the other, i.e. work essentially as a team composed of ground crew plus a crane operator, a leadman coordinating the work of two ground crews necessarily coordinates the work of the crane operators also. One who drives a team cannot drive the near horse without driving the

off horse also, not at all intending any comparison of men to horses by this example.

It seems to the Arbitrator that when the Company places a man in the shipping yard to coordinate the work of the ground crews and expects the crane operators, upon whom the ground crews are absolutely dependent, to perform their part of the work without attention to the coordinator, it places both coordinator and crane operators in an impossible position. Inevitably all will look to the leadman for guidance or no coordination will result. Men in the shipping yard, on the ground as well as above it in the crane cabs come naturally to know their work and to go about their tasks without constant supervision. Work doesn't stop when supervision or leadmen are not constantly at hand but this can hardly mean that coordination does not add to the work of the crews or that crane operators are not affected by it. I do not see how participation in coordination can be barred simply by administrative fiat that it doesn't exist.

In my judgment the Union has made its case and the grievance should be sustained.

Impartial Member of the Panel

December 9, 1972

In the matter of
THE TEXAS STEEL COMPANY
and
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
Local No. 776

File No. 72A/6390
October 18, 1972
Fort Worth, Texas

Arbitration Panel:
Ralph C. Barnhart, Impartial Member
Harold E. Mueller, For the Company
J. E. Floyd, For the Union

SUPPLEMENTAL ARBITRATION AWARD

On December 21, 1972, the Company member of the Arbitration Panel wrote to the Imparital Member of the Panel confirming a telephone request for an executive session. The Union member naturally felt that no such session was necessary. I agreed to schedule an executive session which was held in Fort Worth on July 19, 1973. At this session it appeared that the strong objection of the Company to the proposed draft was that it in effect required the Company to create a leadman over the crane operators against management's desire to do so. The Arbitration Panel clearly has no authority to require the Company to do anything it is not obligated to do under the collective bargaining agreement. The problem, however, is not so simply disposed of. The agreement does require the Company to pay a leadman *at least* $.20 above the highest led classification rate. (Page 41 of the 1971-

72 agreement). The leadman's job in question was created by the Company and the issue becomes one, not of telling the Company what it must do, but of determining as a matter of actual fact what it has done. The Company is governed by the agreement, as is the Union and as is the Arbitration Panel. The question before the Panel, therefore, boils down to whether the loadout leadman leads a crew solely of men working on the ground or whether the crews in the shipping yard actually include the operators of the overhead cranes.

The Company placed great emphasis upon what it asserted to be the fact that the relationship between the crane operators and the ground crews had been changed in no significant respect by the setting up of the loadout leadman classification. In substance the claim seemed to be that what the crane operators did before they continued to do after unaffected by the work of the leadman in coordinating the work on the ground. In fairness, this argument seemed to indicate somewhat closer inspection of this "before and after" aspect of the leadman's job and another hearing was scheduled for this purpose. The hearing was held on October 11, 1973, at the Company plant in Fort Worth. A transcript was made and briefs filed.

While these additional proceedings have been time-consuming it seems to the Impartial Member of the Panel that they served to bring the parties to closer grips with the substance of the issue — just whom does the loadout leadman lead? The second hearing at the plant made it clearer that the moving of the Grievant, Mr. Hurry, from Loadout Man "A" to

Loadout Leadman was not a radical departure from prior practice. Before Mr. Hurry was made a Loadout Leadman he was a Loadout Man "A" in the loading crew and the mill crew. As described by both management witnesses and by Mr. Hurry, there was little significant change in Mr. Hurry's work at all, either with respect to men on the ground or in the cranes. Making him a Leadman was more a recognition of the scope of his duties already being performed than of the creation of new duties. Now, instead of having to go to supervision as a Loadout Man "A" his now status enabled him to perfom his lead work with somewhat more assurance. He could now direct the work and report his direction to his supervisor instead of having first to seek his supervisor's approval. But if it can be said that becoming a leadman made no difference in the work of the crane operators it can equally be said that it made no difference in the work of the ground crews. As Mr. Wicker testified, the work of neither crane operator or ground crew changed. The only difference was "Well, one extra man." (Transcript Pg. 41)

Testimony at this last hearing made it plain that the work of the crane operators and the ground crews is that of collaboration in a single endeavor — to move steel from the mill and from the yard to trucks and cars. Neither can work separately, the ground crews without the cranes can do nothing, the crane operators without the ground crews would be useless. Not only does the ground crew tell the crane operator what is to be moved, the crew has to tell him what equipment he needs. See page 56 of the Transcript in the second

hearing, describing the change of bows with respect to which the crane operator must depend upon the ground crew.

It is abundantly clear that the crane operators are an inseparable part of the loadout crews in the shipping yard and a Leadman with respect to part is unavoidably leadman of all.

The men who testified for Company and Union are not neophytes. Mr. Wicker had worked in his position for 35 years, Mr. Day had been his supervisor for 25 or 30 years, Mr. Hurry had been in the shipping yard for 29 years. The operations under consideration here were not new to them. They surely knew what they were testifying about and none could very well misstate the facts in the presence of the others. Their testimony was not in conflict.

In summary, the record shows that the work of the shipping yard is carried on as a combined cooperative integrated effort of the men on the ground and the men in the cranes, so that when a leadman was given the function of coordinating the work of the ground crews he necessarily coordinated the work of all. A leadman could scarcely coordinate a part without coordinating the whole and the crane operators are as a matter of inescapable fact a part of the whole.

The grievance is sustained.

/s/ Ralph C. Barnhart
Ralph C. Barnhart
Arbitrator

Mr. Mueller dissents.
Mr. Floyd concurs.
November 24, 1973

IN ARBITRATION

In the Matter of
TEXAS STEEL COMPANY,
—and—
AERONAUTICAL INDUSTRIAL DISTRICT LODGE 776 — INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

LOADOUT LEADMAN GRIEVANCE

DISSENTING OPINION OF COMPANY ARBITRATOR

In January, 1972, A. J. Hurry, a loadout leadman in the mill shipping yard, initiated an individual grievance signed by him based on the company's "working leadmen at lower rate of pay than highest classification they lead" in which he requested as a remedy "that the higher rates be paid to leadmen and they be compensated for all monetary losses suffered" (Joint Exhibit 2).

The loadout leadman's classification was established by the company in 1970, and the incumbents in that position, including the grievant, were assigned to lead and direct the work of the loadout ground crews, i.e., Loadout Men "A" and their helpers. These leadmen were paid the stipulated contract differential over the rate of the Loadout Man "A" — the highest paid members of the ground crews. The new leadman classification was established under the 1970-71 contract

with the union. The instant grievance raised the contention for the first time under the 1971-72 contract that the loadout leadmen lead and direct the work of the crane operators and, therefore, are entitled to be paid at the differential based on the crane operator's rate of pay, which is substantially higher than that of Loadout Men "A". The matter was not the subject of contract negotiations in 1971, out of which the 1971-72 contract came.

Applicable Contract Provisions

Pertinent provision of the 1970-71 and 1971-72 contracts are in all respects the same save the pay differential for leadmen, which was increased from 15¢ to 20¢. The following are the provisions of the 1971-72 contract:

1. "Section 3. *The management of the plant*, the selection of employees for supervisory or other classifications not subject to this Agreement, the determination of the products to be manufactured, the location of Company plants, the schedules of production, the methods, standards, processes and means of manufacturing is vested exclusively in the Company.

   "The Company shall have the right, subject to other provisions of this Agreement and to the grievance procedure hereof, to direct the working forces, including but not limited to the right to suspend, demote or discharge employees for proper cause, to lay off for lack of work or other proper reasons, to transfer employees from one job to another and from one shift to another and to change the classification of any employee when such action is not inconsistent with the seniority

provisions hereof and *to create new and additional job classifications for jobs* not already covered by the provisions of this Agreement."

(Article III, Section 3, Jt. Ex. I, pp. 5-6, Emphasis added)

2. "Article XII — Grievance Procedure

"Section 1. The term grievance means any dispute between the Company and an employee, a group of employees, or the Union concerning the effect, interpretation, application, claim of breach or violation of this Agreement.

"Section 2. *All such grievances must be presented in writing within ten (10) days following the occurrence of the event giving rise to grievance, except that an extension of an additional ten (10) days will be granted for grievance pertaining to wages only.* * * * * *"

"Section 11. The Arbitration Board shall have full authority to decide the proper interpretation and application of any of the provisions of this Agreement, but shall not have the power to add to, detract from, or change any of its provisions."

(Jt. Ex. I, p. 15, Emphasis added)

3. "Service and Supply

* * * * * * *

"Loadout Man 'A' ..... $ 2.95

* * * * * * *

"Crane Operator 'A' O.H. 3.38

* * * * * * *

"Leadman classification shall be at least $.20 above highest lead classification rate."

(Appendix "A", Jt. Ex. I, p. 43)

Issue Raised by Grievance

The question to be decided here is whether or not the company had the right and authority to create and establish the job of loadout leadman and to limit the content, duties, and responsibilities of such job and the incumbents therein to leading and directing only the work of the ground crews, i.e., Loadout Men "A" and their helpers.

This issue was raised for the first time in January, 1972, notwithstanding the fact that since the inception of the Loadout Leadman classification in 1970, the leadman differential has been applied to the Loadout Man "A" rate.

The Facts

The operation here involved embraces (1) the removal of product from the rolling mill and the placing of it in bays and other storage areas, and (2) the loading of customers' orders on trucks or other vehicles (R. 11). The work is performed in an open area sometimes referred to as the shipping yard which is serviced by a hundred foot span craneway about 300 feet long (R. 71-72). Two separate cranes operate independently on the same craneway (R. 28).

Organizationally the area is under the Service and Supply Superintendent B. C. Day (C. C. Day). Next in supervisory rank is Supervisor Neil Wicker. Under Wicker are Foreman Charlie Day on the day shift and Foreman Otum (Odom) on the evening shift. The shipping office is near the middle of the craneway (R. 72-74).

Prior to 1970, the personnel assigned to the loadout function at the mill shipping yard consisted to a Loadout Man "A" and three helpers for each crane on two shifts, and on the third shift a Loadout Man "A" and two or three helpers (R. 12-14). Two crane operators were assigned for two shifts and one for the third shift.

In 1970, Vice President Wilson decided that a non-supervisory Loadout Leadman classification should be established (R. 59). Considerations motivating his determination were increased work loads and anticipated further increases. The leadman as a working member of the loadout crew performs loadout work and does some coordination of the whole ground crew (R. 27, 50, 59-60). The Loadout Leadman was designated to lead the ground crew only. He was not to be a leadman over the crane operators (R. 60). The crane operator is the highest paid employee in the area and is perfectly capable of making decisions of his own. He works in conjunction with the ground crew helpers, loadout men, and leadmen (R. 48, 60). The number of men in the ground crew can vary, but the number of crane men is set by the number of cranes operating (R. 61).

The Loadout Leadman is an appointive job. Its incumbent is selected by management, and the duties and responsibilities of the assignment are outlined and determined by management (R. 26).

Prior to the designation of Loadout Leadman in 1970, the company had the same two cranes which were operated the same way as they are now operated, and the make-up of the loadout crews was the same (R. 26, 29).

There has been no change in the duties, functions or responsibilities of Loadout Leadmen since the inception of their classification (R. 63). In reality the Loadout Leadman classification is an expansion of a loadout man's job to coordinate two ground crew groups rather than to have two Loadout Man A's operate independently of each other (R. 63).

The Loadout Leadmen generally keep one ground crew unloading the mill and the other loading trucks (R. 19). When a truck comes in the Loadout Leadman goes to the office for loading instructions from Supervisors Wicker, Odom, or Day. He then tells the Loadout Man "A" what to do, and most of the time he is able to help the loadout crew finish the assignment (R. 20-21). He also advises the crane operator where they are going and how many bundles are to be loaded so the crane operator will know how to place them on the truck (R. 21). The mill crane stays at the mill to keep it unloaded unless there is slack time or a breakdown in which event the mill crane may load trucks (R. 21).

The crane operator works for one loadout crew or the other, and if he is not working for a loadout crew he has nothing to do (R. 22). When the crane operator completes an assignment he goes to a designated place and waits for direction from a member of the loadout crew (R. 22).

When Supervisor Wicker told Loadout Leadman Hurry of his appointment as leadman, Wicker did not

tell Hurry that he was to lead and direct the crane operators (R. 25).

The crane operators get signals from the entire ground crew — helpers, loadout A's, and leadmen. The lowest classification can signal the crane operator and tell him where to go, and what to carry and unload. They did this before the Loadout Leadman classification was created and they still do it (R. 30-31). Giving signals to the crane operator is part of the helper's function (R. 37).

If the Loadout Man "A" at the mill gets behind now, he goes to the Loadout Leadman for help. Prior to 1970, he went to the other Loadout Man "A" or to the office (R. 32-33). However, a Loadout Man "A" can still direct the "truck" crane to service a mill pile-up (R. 31).

The Loadout Leadman does not do any different now than a Loadout Man "A" did when A. J. Hurry was a crane operator (R. 36). The duties and functions now exercised by Loadout Leadmen are the same as those formerly exercised by Loadout Man "A" and helpers (R. 38). If the crane operator was led prior to the creation of the Loadout Leadman classification, he was led by the Loadout Man "A" and his helpers (R. 38). The mill crane operator knows where to go and what to do (R. 39). When the Loadout Leadman is at the mill the truck crane operator gets his instructions from the Loadout Man "A" and the helpers (R. 38). The only difference now as compared with pre-1970 operations is that the Loadout Leadman does all of the going to the office and getting of instructions

(R. 44). Except for going to the office the Loadout Man "A" 's job is unchanged (R. 44, 47). The functions of the Loadout Leadman with respect to the crane operator are the same as those the Loadout Man "A" used to and still does perform (R. 47).

The working of overtime and the personnel to be assigned overtime work are determined by Supervisors Wicker or Day who inform the Loadout Leadman who in turn tells the crew (R. 23, 41).

The crane operator takes his lunch break at the same time as his ground crew, and if he needs to leave the crane cab, he advises his ground crew so they will know the crane is out of service (R. 19, 23, 33, 34, 35). Before the institution of the Loadout Leadman classification the crane operator told Loadout Man "A" when he wanted to leave the crane cab, and when he did so it was simply the case of one non-supervisory employee telling another that he was going to be away from his work station (R. 33). Crane operators operated the same way in years past as they do now (R. 46).

The crane operator operates within his own skill and needs no direction concerning the operation of his own crane (R. 8-9).

It was stipulated that Loadout Leadmen are not supervisory employees.

In the mill shipping yard, the yard or overhead crane operator and the loadout crew operate as a team both in "unloading" the mill and in loading trucks and other vehicles with the mill's product for delivery to

customers. The crane operator and the loadout crew are mutually interdependent. The crane operator is confined to his crane cab high above ground level where he operates the crane fore and aft on its way as well as transversely on its beam. He raises, lowers, and transports loads in response to hand and vocal signals from any or all members of the loadout crew (Helpers, Loadout Man "A", and Loadout Leadmen). The crane operator is competent within his own skill to operate his crane and he needs no direction or instruction from the loadout or ground crew to operate the crane. He is separately supervised. He operates his crane as a service to the loadout crew and through their signals coordinates his skill with their requirements. His distance from and inaccessibility to the ground make it physically impractical for him to select the material for loading, and to hook and unhook it.

The loadout crew selects the material for loading as determined by orders, hook it, designate the place for transit, and unhook it at destination. They, however, are incapable of transporting the material in effective quantity. By harmonizing their efforts with those of the crane operator the mill materials are effectively handled.

Except for the creation of a Loadout Leadman classification to coordinate the loadout crews and to augment their staffing by an additional person, there has been no change in the method of operation in the mill shipping yard for many years. The Loadout Leadman has no more authority or "lead" over the crane operators than did the Loadout Man "A" before the establishment of Loadout Leadmen. No contention has ever been made that the Loadout Man "A" lead or directed the crane operator.

The relationship between the crane operator and the entire loadout crew is that of non-supervisory employees working together harmoniously to accomplish a common end. There is no distinction in principle between that of fellow members of a production line in different departments and the relation of the crane operators and the loadout crews.

There is not a fragment of evidence that any crane operator has been "led or directed" by a Loadout Leadman. The grievant has offered as evidence the fact that the crane operator has the same lunch and break periods as the loadout crew assigned to his crane and that the crane operator will advise a member of the loadout crew if he has to leave the crane for a personal reason, such as a headache or need for a restroom.

In view of the fact that loadout crew and the crane operator are mutually interdependent in the performance of work it is only reasonable or practical that they should eat and have their breaks at the same time. This embraces no facet of leading and directing. The notification by the crane operator to a member of the loadout crew of his absence from the crane is an act of simple courtesy and is nothing but "helping" each other. It is not evidence of leading or directing by the Loadout Leadman.

It is clearly evident that under the relevant collective agreement the institution of a leadman classifica-

tion and definition of its scope are unfettered management functions. The uncontradicted substantial evidence reveals that the Loadout Leadman classification was created by the company in the exercise of its management function to increase by one person the constituent number of the loadout crews and to coordinate and make the loadout crews more efficient. At no time was it intended or expressed by the company that Loadout Leadmen should have any leading or directing authority over the crane operators. In fact the grievant admitted that he was not told that the crane operator was to be under his authority or direction.

Aside from the fundamental and more relevant considerations noted above, simple mathematics demonstrates the extreme fallacy of asserting that the company would consider placing the crane operators under the scope of Loadout Leadmen. The rate of a Loadout Man "A" is $2.95. The rate of a leadman of that classification would be $3.15. The rate of a crane operator is $3.38. The rate of a leadman over that classification would be $3.58. Obviously no one would pay a rate of $3.58 per hour to direct work classifications having a maximum rate of $2.95 per hour.

This record shows beyond doubt that the relationship between the crane operators and the constituent members of the loadout crew, including its Loadout Leadman, has been unchanged for many years; that crane operators are not subject to any peculiar authority of Loadout Leadmen, that the classification of Loadout Leadman was established through a proper application of management function; and, that crane

operators were not placed within the scope of Loadout Leadmen.

If as the majority have stated the resolution of the issue here is not one that can come about through logical analysis, then the decision of the majority is based upon personal whim, caprice, and speculation, all contrary to the contract under which this proceeding is held.

In their attempt to analogize, the majority misconceive the proper relationship between the ground crews and the crane operators. The work of the two ground crews is coordinated by the leadman, and they constitute the near and off members of the team referred to by the majority. If the crane operators are to be forced into the majority's analogy they would be more in the nature of a wagon or buggy following the team, but not directed by the leadman. The function of the cranes and the crane operators is to service the loadout crews, and whether the loadout crews are coordinated is not a concern of the crane operators.

The majority's assertion that crane operators look to the leadman for guidance flies into the face of the uncontradicted record to the effect that crane operators receive and respond to directions from any member of the ground crew whether he be a helper, a loadout man A, or a loadout leadman.

The majority miss the issue completely when they state "this can hardly mean that coordination does not add to the work of the crews or that crane operators are not affected by it." The volume of work performed was never in dispute. The sole issue presented by the

grievance is whether the Loadout Leadman is a leadman for the crane operators. This may be stated as a question, "Is the relationship of the Loadout Leadman to the crane operators any different from the relationship of the loadout helpers and the Loadout Leadman "A" to the crane operators?"

The answer to this question is a clear and unequivocal "No"! The crane operator responds to the direction or signal of any member of the loadout crew.

There is no evidence that the crane operator is in anyway lead by the loadout leadman. The fact that the crane operator takes his breaks and eats at the same time as the loadout crew is no evidence he's being lead by the loadout leadman. The crane operator took his breaks and ate at the same time the crew did before there was a loadout leadman.

The fact that Crane Operator Ainsworth checked with Leadman Hurry only after he had first determined there were no supervisors in the office clearly shows that the crane operator recognized and knew that the loadout leadman did not have jurisdiction or authority over him.

There is absolutely no evidence that the crane operators look to the loadout leadman for guidance.

The majority's statement, "I do not see how participation in coordination can be barred simply by administrative fiat that it doesn't exist" reflects the fallacy of their conclusion. The only work to be coordinated was in the work of the ground crews upon the ground and then primarily in the work of the Loadout Lead-

men "A". There was no problem with or between the crane operators at the time the Loadout Leadman classification was established. Further, coordination is not the crucial issue. The issue is limited to whether the Loadout Leadmen lead and direct the crane operators. On this point the record shows without contradiction that when the company created the Loadout Leadman classification, crane operators were excluded from the authority of the Loadout Leadmen. In addition, there is and was no need for any leading of the crane operators.

The majority in the Supplemental Arbitration Award doggedly continue to perpetuate the errors into which they fell in their initial award. There is no evidence to support the majority's statement that "the moving of Grievant, Mr. Hurry, from Loadout Man "A" to Loadout Leadman was not a radical departure from prior practice." The majority must concede, as the record irrefutably establishes, that the Loadout Man "A" made frequent trips to the office for loading instructions and shipping orders prior to the creation of the leadman classification, Subsequent thereto Loadout Man "A"s ceased going to the office and the Loadout Leadman made all such trips. The majority's finding that "Making him (Mr. Hurry) a Leadman was more a recognition of the scope of his duties already being performed than of the creation of new duties. Now, instead of having to go to supervision as a Loadout Man 'A' his new status enabled him to perform his lead work with somewhat more assurance" is not only not supported by the record but is contrary to it. There is absolutely no evidence from which it

can be found or concluded that Mr. Hurry, prior to his appointment to the Loadout Leadman position, either had or exercised any lead authority over the two ground crews. Mr. Hurry's current lead authority over the ground crews is by express management authority and he does not, as the majority state, "perform his lead work *with somewhat more assurance.*" (Emphasis supplied).

The finding and conclusion of the majority that,

> "But if it can be said that becoming a leadman made no difference in the work of the crane operators it can equally be said that it made no difference in the work of the ground crews"

flies in the face of the record and is simply not true. Obviously, the ground crews performed the same kind of work they previously did, but their source of immediate direction became the Loadout Leadman and not Mr. Wicker.

The majority continue to misapprehend the facts in their Supplemental Award when they state, "It is abundantly clear that the crane operators are an inseparable part of the loadout crews in the shipping yard and a Leadman with respect to part is unavoidably leadman of all." The crane operators and the loadout ground crews work together harmoniously, but it does not follow logically that a leadman of the ground crews of necessity leads and directs the crane operator. The majority's statement is in the nature of the "fiat" they condemn when exercised by management.

Similarly the majority err in their finding and conclusion "* * * so that when a leadman was given the function of coordinating the work of the ground crews he necessarily cooredinated (sic) the work of all. A leadman could scarcely coordinate a part without coordinating the whole and the crane operators are as a matter of inescapable fact a part of the whole." The majority have ignored the record and substituted their judgment for that of management. Whether the leadman coordinates or directs only a part of an operation is of no concern to the majority. Likewise, whether the majority feel that other or different action would be better or less difficult of accomplishment is entirely beyond their authority. The majority cannot lawfully substitute their judgment for that of management as they have done in their award.

The majority have arrogated unto themselves strictly managerial functions that belong to and are to be exercised by the company. It is not within the province of the majority to substitute their judgment for that of management in limiting or expanding the scope of authority of an employee.

The creation of a new job and the definition and determination of its content, duties and responsibilities is by nature an essential right and function of management protected by the collective agreement and it is not the result of the exercise of administrative fiat.

Here the job created by the company was non-supervisory, expressly limited to the loadout ground crews, and did not include crane operators. The exclusion of crane operators was within the province and

authority of management and was not the exercise of administrative fiat. The attempt of the majority to place the crane operators under the loadout leadmen constitutes a clear overreaching of management in setting up and limiting the job and job content and a usurpation by the majority of management's authority and function for which there is no grant or support in the contract or the law.

If it is true, as the majority suggests, that limiting the direction of the loadout leadmen to the loadout ground crews would not achieve maximum coordination in the department, such a result would be clearly the responsibility of management and not for the arbitrators to attempt to remedy by decreeing a change in the job content, duties and responsibilities of the loadout leadmen as the majority has sought to do in this case.

The grievance should be denied.

/s/ Harold E. Mueller
Arbitrator for Texas Steel Company

APPENDIX "B"

DISTRICT COURT'S ORDER GRANTING UNION'S MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. CA 4-74-44

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
DISTRICT 776
VS.
TEXAS STEEL COMPANY

ORDER

This is an action involving the violation and enforcement of a collective bargaining agreement. This Court has jurisdiction under 29 U.S.C. § 185.

This case arose out of a grievance initiated by Mr. A. J. Hurry alleging that he was a lead man and being paid at a rate lower than required by the collective bargaining agreement. The agreement, in pertinent part, requires the lead man to be paid $.20 an hour above the highest led classification rate. Following the procedure required by the agreement, the arbitration panel concluded that the company had violated the agreement and sustained the alleged grievance. The defendant has refused to abide by the arbitration award.

The issues in this case are (1) whether the grievance is arbitrable, and, if so, (2) whether the arbitra-

tor's award is based on the collective bargaining agreement. *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); *United Steel Workers v. American Mfg. Co.*, 363 U.S. 564 (1960).

The decision of whether or not a grievance is arbitrable should be determined under the arbitration clause of the collective bargaining agreement. *See, United Steel Workers v. American Mfg. Co., supra.* In the case at bar, the agreement called for the Arbitration Board to decide the proper interpretation and application of any of the contract provisions. The arbitrator interpreted the contract provision requiring the lead man to receive additional compensation of $.20 per hour. He then applied the facts of the case to determine who the lead man was leading. This was a necessary implication of interpreting the contract. The arbitrator did not invade the province of management and tell them who the lead man was to lead, but merely looked at the facts as they existed to determine who he was *actually* leading. Even though this Court may not necessarily agree with the decision of the arbitrator, under the permissible scope of review the determination that the lead man in fact led the craneman involved an interpretation and application of the contract, and, therefore, was arbitrable.

United Steel Workers of America v. Warrior and Gulf Navigation Co., supra, involved a similar fact situation. In that case the parties had not negotiated regarding the employer's contracting out some work. After the union filed a grievance under the collective

bargaining agreement, the employer answered that under the contract this was strictly a management decision and was not arbitrable. Even in the face of the management rights clause, the Court held the issue to be arbitrable under the contract. In the case at bar, the issue is also whether the management rights clause removes this question from the arbitration clause. Here also the answer must be that the facts present a question of the interpretation and application of the contract and are, therefore, arguably within the arbitration clause.

After determining that the case was arbitrable, the question is whether the award is based on the arbitrator's interpretation of the collective bargaining agreement. The arbitrator made a factual determination regarding the lead man and then applied that determination to the contract clause. It is clear in this case that the award is based on the arbitrator's interpretation of the agreement and that he did not dispense his own brand of industrial justice. *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, supra, at 597.

After viewing the case under the permissible scope of review, *it is clear that the plaintiff is entitled to its motion for summary judgment.*

It is therefore Ordered and Adjudged that the plaintiff's motion for summary judgment is granted with each party to pay their own costs and attorney's fees.

Entered this 26th day of October, 1974.

/s/ Eldon B. Mahon
United States District Judge

APPENDIX "C"

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 776, Plaintiff-Appellee Cross Appellant,
v.
TEXAS STEEL COMPANY, Defendant-Appellant Cross Appellee.

No. 74-4083.

United States Court of Appeals, Fifth Circuit.

Sept. 17, 1976.

Michael D. Shattman, Harold E. Mueller, Ft. Worth, Tex., for defendant-appellant cross appellee.

James L. Hicks, Jr., Dallas, Tex. for plaintiff-appellee cross appellant.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, GODBOLD and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge:

Following Texas Steel Company's (hereinafter Company) refusal to abide by the decision of an arbitration panel, District 776 of the I.A.M. (hereinafter

Union) instituted this action in the court below seeking enforcement of the award.[1] The district court granted summary judgment for the Union based on the pleadings and exhibits. It also directed that each party pay its own costs and attorneys' fees. The Company appeals from the order granting summary judgment and the Union cross-appeals from the failure of the district court to award it costs and attorneys' fees. We affirm with respect to the main appeal and vacate and remand with respect to the cross-appeal.

I. *Facts*

The Company's shipping yard operation entails moving its factory output from the plant and loading the goods onto trucks. Involved in this function are two ground crews and two cranes and crane operators. Prior to 1970 each of the two crews was coordinated by a "Loadout Man 'A.'" The plant's shipping yard activity increased in volume and in the 1970-71 contract between the Company and the Union a new job classification was created in the yard.

The new position was entitled "Loadout Leadman"; the persons appointed to it were those who previously had been designated Loadout Men "A." The Leadman position was specifically designated as being non-supervisory. Apparently the duties of the leadmen were not altered a great deal from those the Loadout Men "A" previously had performed. The essence of the leadmen's job was to coordinate and ensure the smooth functioning of the shipping yard operation.

[1] Jurisdiction was based on 29 U.S.C. § 185.

The position was added primarily to obtain more workers in this growing facet of the Company's operation.

The 1971-72 labor contract between the Company and the Union provided that leadmen were to be paid "at least $.20 above highest led classification rate." Pursuant to this provision Leadman A. J. Hurry was paid $3.15, which was 20 cents per hour above what the highest paid ground crew members (now Loadout Men "A") received. The shipping yard crane operators, however, were paid $3.38 per hour under the contract. Thus, in January of 1972 A. J. Hurry filed a grievance with union officials, contending that he should be paid $3.58 per hour, rather than $3.15, because he "led" the crane operators as well as the ground crew.

II. *Prior Proceedings*

Initial stages of the grievance procedure failed to result in resolution of the dispute and it proceeded to arbitration. The Company voluntarily submitted to arbitration. The arbitration panel consisted of one Company representative, one Union representative and one impartial arbiter. Concluding that it was inevitable that the leadmen "led" the crane operators as well as the ground crew members because otherwise the yard operation would not be coordinated, the panel ruled in favor of the Union. The Company representative dissented.

After the Company voiced strong objection to the award, a subsequent hearing was held. Another de-

cision affirming the original conclusion was entered.[2] The decision recognized that the leadmen's duties did not differ a great deal from those they had previously performed as Loadout Men "A," although it was also noted that leadmen did in fact exercise more supervision in the first instance than had the Loadout Men "A". The panel summarized its findings and conclusions as follows:

> [T]he record shows that the work of the shipping yard is carried on as a combined cooperative integrated effort of the men on the ground and the men in the cranes, so that when a leadman was given the function of coordinating the work of the ground crews he necessarily coordinated the work of all. A leadman could scarcely coordinate a part without coordinating the whole and the crane operators are as a matter of inescapable fact a part of the whole.

The Company refused to accept the decision of the arbitration panel, despite the fact that under the collective bargaining agreement that decision was "final and binding." The Union filed this action in the court below to enforce the award. The court concluded that the grievance was arbitrable and that the award was based on the collective bargaining agreement. Summary judgment for the Union was granted on the basis of the pleadings and exhibits, but it was not awarded costs and fees. This appeal and cross-appeal ensued.

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[2]Both the original and the supplemental decisions of the arbitration panel were written by the impartial arbitrator. There is no contention by the Company that these decisions do not represent the view of the panel majority.

III. *The Company's Appeal*

A. *Appropriateness of Summary Judgment*

The Company contends that summary judgment was inappropriate in this case and cites four purported "material factual issues" in support of this position. The fundamental defect in this argument is that matters in dispute characterized as "fact" issues by the Company are actually conclusions of law, not questions of fact.[3] It is axiomatic that where questions of law alone are involved in a case summary judgment is appropriate. *See Asuncion v. District Director, INS*, 427 F.2d 523, 524 (9th Cir. 1970); *Ammons v. Franklin Life Insurance Co.*, 348 F.2d 414, 416-17 (5th Cir. 1965); *Molinos De Puerto Rico, Inc. v. Sheridan Towing Co.*, 62 F.R.D. 172, 176-78 (D.P.R. 1973). When an arbitration award has been made, the only potential areas for consideration of factual questions that would preclude summary judgment concern whether the dispute actually was arbitrable, *H. K. Porter Co. v. Local 37, United Steelworkers*, 400 F.2d 691, 695-96 (4th Cir. 1968); *Local 1645, U.A.W. v. Torrington Co.*, 358 F.2d 103 (2d Cir. 1966); *Local 12799, U.M.W. v. Matthiessen*

[3]The alleged material issues of "fact" are: (1) whether a violation of the collective bargaining agreement was involved; (2) whether the Company is engaged in interstate commerce; (3) whether the collective bargaining agreement was in effect at the relevant times; and (4) whether the arbitration panel concluded that the Company had violated the agreement and, apparently, whether the panel sustained the grievance.

Arguably, numbers (2) and (3) *supra* are mixed questions of law and fact that might preclude summary judgment. However, the Company is unquestionably subject to NLRB jurisdiction, which requires the interstate nexus, and it admitted in its answer that the collective 1972. Hence, these elements actually were and are not disputed issues.

& Hegeler Zinc Co., 291 F.Supp. 578 (N.D.W.Va. 1968), and whether the award drew its "essence" from the agreement, *Marble Products Co. v. Local 155, United Stone & Allied Products Workers*, 335 F.2d 468, 471 (5th Cir. 1964); *Torrington Co. v. Local 1645, U.A.W.* 362 F.2d 677, 679-80 & nn. 5-6 (2d Cir. 1966). This inquiry entails whether the alleged arbitrable claims are governed by the contract and its arbitration provisions and whether the arbitration panel has confined its decision, and possibly the remedy, to the interpretation and application of the collective bargaining agreement. The court must scrupulously avoid the invasion of the arbitration panel's sphere and the enticement of ruling on the "intrinsic merits" of the dispute. *International Ladies' Garment Workers Union v. Ashland Industries, Inc.*, 488 F.2d 641 (5th Cir.), *cert. denied sub nom., Alfin v. International Ladies' Garment Workers Union*, 419 U.S. 840, 95 S.Ct. 71, 42 L.Ed.2d 68 (1974); *Teamsters Local 745 v. Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371 (5th Cir. 1970), *cert. denied*, 401 U.S. 937, 91 S.Ct. 926, 28 L.Ed.2d 217 (1971).

Accordingly, the question of the propriety of summary judgment in this case turns on whether there were material issues of fact concerning the arbitrability of the dispute and the proper application of the "essence" standard. Since there were no material questions of fact concerning these issues, summary judgment was appropriate. Thus, the point of contention that we must resolve concerns whether the district court applied the correct test and reached the correct result on the legal questions of arbitrability and scope of the arbitration panel's decision. *See Mar-*

ble Products Co. v. Local 155, United Stone & Allied Products Workers, 335 F.2d 468 (5th Cir. 1964).

B. *Arbitrability*

1. *Standard Utilized Below*

In holding that the instant dispute was arbitrable, the district court employed principles enunciated in the "Steelworkers' Trilogy,"[1] and concluded that since the dispute was arguably within the arbitration clause it was, in fact, arbitrable. The Company asserts that this test applies only when the employer refuses to arbitrate in the first instance, rather than in situations, such as the instant one, where the employer voluntarily proceeds to arbitration but refuses to abide by the award. However, this position is at least implicitly rejected by one of the "Steelworkers' Trilogy" itself;[5] further, this court has specifically ruled that the postulates enunciated in the Trilogy apply to suits to enforce arbitration awards as well as those to compel arbitration in the first instance. *Teamsters Local 745 v. Braswell Motor Freight Lines, Inc.*, 392 F.2d 1 (5th Cir. 1968).[6] Moreover, the *Braswell* doc-

[1]*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed 2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

[5]*The Enterprise Wheel & Car Corp.* case involved an action for enforcement of an arbitration decision.

[6]*Braswell* was modified on rehearing in minor respects not relevant for our purposes at 395 F.2d 655. The case was affirmed after remand in relevant part at 428 F.2d 1371. Certiorari was denied at 401 U.S. 937, 91 S.Ct. 926, 28 L.Ed.2d 217 (1971). It is a definitive statement in this circuit on the aspects of federal labor law with which it deals, including the propositon for which we cite it. *See Local 25, San Antonio Newspaper Guild v. San Antonio Light Div'n*, 481 F.2d 821, 823–24 & n. 2 (5th Cir. 1973).

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trine is based on solid reasoning. A company or union should not be permitted to defeat the sound policies supporting the presumption of arbitrability by the mere procedural device of going to arbitration, but refusing to abide by the award. Accordingly, the district court did not err in applying the presumption of arbitrability in this case.

2. *Result Reached Below*

The Company asserts that the dispute was not arbitrable because the Company has the sole discretion to create new job classifications. The leadman position was such a new classification, the argument goes, and therefore the panel exceeded its power by, in effect, deciding whom the leadman led.

The short answer to this contention is that the clause empowering the Company to create new job classifications is explicitly and specifically "subject to other provisions of [the contract] and to [its] grievance procedure." There is no provision in the contract that meets the "Steelworkers' Trilogy" standard, which requires a clear and unambiguous exclusion of the dispute from the arbitration mechanism in order to defeat arbitrability. *See Communications Workers v. Southwestern Bell Tel. Co.*, 415 F.2d 35, 38-39 5th Cir. 1969). Thus, the district court's conclusion that the instant dispute was arbitrable is not erroneous.

C. *Essence Vel Non?*

The Company contends that the arbitration panel's decision is arbitrary and capricious in that it did not confine itself to the interpretation and application of

the collective bargaining agreement. In addition, the Company contends that the decision cannot be rationally derived from that agreement. In substance, the Company's argument is based on its conclusion that the panel decision assigned to the leadmen certain duties that in its opinion the leadmen should perform, rather than the duties which the Company, in its sole and rightful discretion, assigned to the position.

In these types of cases, however, the scope of review by courts is extremely limited. When the question of arbitrability is resolved in favor of arbitration, our only remaining function is to determine whether the award draws its "essence" from the collective bargaining agreement; we do not review the merits or the factual and legal accuracy of the arbiter's findings. *Local 540, Amalgamated Meat Cutters v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir. 1973). The "essence" standard is to be interpreted expansively so as to uphold the award, rather than restrictively. *See United Steelworkers v. United States Gypsum Co., 492 F.2d 713, 731-32 (5th Cir.), cert. denied,* 419 U.S. 998, 95 S.Ct. 312, 42 L.Ed.2d 271 (1974).

In the instant case the collective bargaining agreement grants the arbitration panel, "full authority to decide the proper interpretation and application of any of the provisions," but denies it the power, "to ad to, detract from or change," any of the provisions. As noted above, the Company's right to create new job classifications is expressly subject to the agreement's grievance provisions; the clause upon which the Union based its claim, and the arbitration panel

its award, provides that the "Leadman classification shall be at least $.20 above highest led classification."

It is apparent that in concluding that the leadmen led the crane operators, the panel was merely interpreting and applying these provisions of the agreement to the realities of the loading dock operation. The Company admitted that the shipping yard work necessitated "cordination" among the entire crew, including the crane operators. The panel quite reasonably concluded that in order for the work to be coordinated the leadmen as a practical matter "led" the crane operators as well as the ground crew. Apparently, the Company would have us make a delicate differentiation between directing the work so as to coordinate it and leading a crew. Unappealing as the drawing of such an ethereal distinction might be in the first instance, certainly its mere enunciation evidences the fact that the arbitration panel did not act arbitrarily or capriciously in refusing to make it. The panel's decision is well within the standard which requires it to draw its "essence" from the contract; the district court did not err in ordering enforcement of the award.

IV. *The Union's Cross-Appeal*

The Union contends that the Company's refusal to abide by the arbitration award was without justification and that, therefore, the Union was entitled to an award of attorneys' fees and costs. *United Steelworkers v. United States Gypsum Co., supra* Part III C. It asserts that this court is as capable as the district court of resolving the question whether a

challenge to an arbitration award is without justification because the standards for judicial review in these cases are so restricted. It asserts that since the district court found it "clear" that the panel based the award on the contract and "clear" that the Union was entitled to summary judgment, it is apparent that the Company raised no colorable or valid arguments in opposition to the award. Accordingly, the Union asserts that in order to discourage frivolous refusals to abide by arbitration decisions, and to foster the clear federal labor policy favoring arbitration, this court should declare the Company's challenge in this case to be without justification and should order the award of costs and attorneys' fees.

We find the Union's analysis rather compelling. Although § 301 of the Labor Management Relations Act[7] does not specifically provide for costs and attorneys' fees, it is clear that when a challenge to an arbitration panel's decision is without justification these costs are awardable. *District 50, U.M.W. v. Bowman Transportation, Inc.*, 421 F.2d 934 (5th Cir. 1970); *Local 149, U.A.W. v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir.), *cert. denied*, 369, U.S. 873, 82 S.Ct. 1142, 8 L.Ed.2d 276 (1962); *Local 494, I.B.E.W. v. Artkraft, Inc.*, 375 F.Supp. 129, 132-33 (E.D.Wis. 1974); *Local 4076, United Steelworkers v. United Steelworkers*, 338 F.Supp. 1154, 1164 (W.D.Pa. 1972) (Supp.Mem). However, this court's scope of review is limited to determining whether the district court abused its discretion in its decision concerning costs and attorneys' fees. *Local 4, I.B.E.W. v. Radio Thir-*

[7]29 U.S.C. § 185.

teen-Eights, Inc., 469 F.2d 610, 615 (8th Cir. 1972); *District 50, U.M.W. v. Bowman Transportation, Inc.*, *supra* at 935.

In the present posture of this case, we are unable to find such an abuse of discretion, although we note that any justification for the Company's challenge is not apparent. The only clause that the Company purports to rely on is expressly subject to the grievance procedure, which includes "final and binding" arbitration. Beyond peradventure the panel's decision was not arbitrary or capricious.[8] Accordingly, the only real contention the Company has made throughout this case goes to the "intrinsic merits" of the dispute. As previously noted, this challenge appears devoid of merit because it does not go to the jurisdiction of the arbitration panel (arbitrability) or the validity of the award ("essence"). *Cf. Local 179, United Textile Workers v. Western Textile Products Co.*, 374 F.Supp. 633 (E.D.Mo.1974) (jurisdiction and "essence" were "sincerely questioned"; award of fees would be inappropriate).

We refuse to countenance frivolous and wasteful judicial challenges to conscientious and fair arbitration decisions. In the case *sub judice* the district court ordered each party to bear its own costs and attorneys' fees, but made no finding on whether the Company's challenge was justified. We vacate and remand on the cross-appeal for a specific finding on this question and an award of costs and attorneys' fees by the district court if it determines that the refusal to abide by the arbitration award was without justification.

[8]For the reasons stated in Part III *supra*.

See Sheeder v. Eastern Express, Inc., 375 F.Supp. 655, 661 (W.D.Pa.1974) (rule stated, relevant cases cited); *Local* 15253, U.M.W. v. James Julian, Inc., 341 F.Supp. 503, 508 (M.D.Pa.1972) (rule stated, relevant cases cited).

AFFIRMED on main appeal; VACATED and REMANDED with directions on cross-appeal.

APPENDIX "D"

Pertinent Portions Of Agreement Between Texas Steel Company, Fort Worth, Texas And The International Association Of Machinists And Aerospace Workers, Lodge 1591, November 21, 1971, Fort Worth, Texas

ARTICLE III

RELATIONSHIP BETWEEN THE COMPANY AND THE UNION

Section 3. The management of the plant, the hiring of employees, the selection of employees for supervisory or other classifications not subject to this Agreement, the determination of the products to be manufactured, the location of Company plants, the schedules of production, the methods, standards, processes and means of manufacturing is vested exclusively in the Company.

The Company shall have the right, subject to other provisions of this Agreement and to the grievance procedure hereof, to direct the working forces, including but not limited to the right to suspend, demote or discharge employees for proper cause, to lay off for lack of work or other proper reasons, to transfer employees from one job to another and from one shift to another and to change the classification of any employee when such action is not inconsistent with the seniority provisions hereof and to create new and additional job classifications for jobs not already covered by the provisions of this Agreement.

ARTICLE XII
GRIEVANCE PROCEDURE

Section 1. The term grievance means any dispute between the Company and an employee, a group of employees, or the Union concerning the effect, interpretation, application, claim of breach or violation of this Agreement.

Section 4. The party desiring to refer an unsettled dispute or grievance to arbitration shall notify the other party in writing ten (10) working days after receipt of the decision of the Company in Step Three of the grievance procedure, of its intention to arbitrate.

Section 5. The Board of Arbitration shall consist of three (3) members; one (1) to be selected by the Company; one (1) to be selected by the Union, and a third and neutral member to be selected by these two.

Section 10. The Arbitration Board shall meet in Fort Worth as soon as posible, but not later than thirty (30) days following the decision of the third arbiter, hear all the evidence in the case and render a decision in writing as soon after the close of the hearing as conveniently possible.

Section 11. The Arbitration Board shall have full authority to decide the proper interpretation and application of any of the provisions of this Agreement, but shall not have the power to add to, detract from or change any of its provisions.

Section 12. A majority decision of the Arbitration Board rendered in accordance with the foregoing procedure shall be final and binding on all the parties.

APPENDIX A, PAGE 43

	Min. Rate	30 Days	90 Days
SERVICE AND SUPPLY			
Bar Shearman "A"	2.95		
Bar Shearman "B"	2.80		
Bar Shear Tabler	2.74		
Bender Operator "A"	3.01		
Bender Operator "B"	2.85		
Shipping Clerk "A"	3.22		
Shipping Clerk "B"	2.82		
Crane Opr. "A" O.H.	3.38		
Crane Opr. "B" O.H.	2.92		
General Helper — Material Yard	2.30	2.40	2.59
General Helper — Mill Shipping and Mill Fabrication	2.30	2.40	2.59
Ingot Checker	2.85		
Ingot Trimmer	2.85		
Loadout Man "A"	2.95		
Loadout Man "B"	2.76		
Mill Checker "A"	3.11		
Mill Checker "B"	2.90		
Mold Grinder "A"	3.11		
Mold Grinder "B"	2.69		
Pin Bender Operator	2.74		
Scrap Burner (Mill Area)	2.85		
Truck Driver	2.95		
Yard Crane Operator "A"	3.38		
Yard Crane Operator "B"	2.92		

Employees assigned to operate the steel saw for one hour or more continually shall be paid Shearman "A" rate or his classification rate, whichever is higher, for the time actually operating the saw.

Leadman classification shall be at least $.20 above highest led classification rate.

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-806

TEXAS STEEL COMPANY,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT 776

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent, International Association of Machinists and Aerospace Workers, District 776, adopts those portions of the Petition filed by Texas Steel Company headed "Opinions Below"; "Jurisdiction" and "Statutory Provisions Involved."

QUESTIONS PRESENTED

The only question of any color raised by the Petition is:[1]

> Whether the Court of Appeals erred in applying the test of substantive arbitrability established by this Court in *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960) to determine whether the dispute at hand was arbitrable under the parties' collective bargaining agreement.

STATEMENT OF THE CASE

But for one additional matter Petitioner's Statement of the Case is sufficient. For sake of certainty and disposition of all issues posed by Petitioner it is important to note that the gravamen of the grievance submitted to the arbitrator was whether the newly created "loadout leadman" was being paid correctly under the provisions of the parties' contract.[2] In both his initial and supplemental award the arbitrator concluded that resolution of the grievance turned upon "whether Grievant Hurry does in fact serve as leadman to the Crane Operators as well as the ground crews." (Pet. App. p. A-2 and A-9.)[3] Contrary to Petitioner's assertions (Petition pages 6-10), neither the issue before the arbitrator or its resolution involved the right of the employer to create new job classifications.

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[1] Petitioner raises other issues relating to the propriety of the arbitrator's decision and the Court of Appeals remand to the District Court for resolution of questions material to granting attorneys fees. The resolution of these issues is firmly supported in the decision below and do not, therefore, warrant response here.

[2] Appendix A, page 43 of the contract set forth on page A-47 of the appendix following the Petition requires: "Leadman classification shall be at least $.20 above the highest led classification rate."

[3] References to the appendix to Petition will be by notation "Pet. App." followed by appropriate pagination.

ARGUMENT

Reason for Denying the Writ—the Decision of the Fifth Circuit Court of Appeals Does Not Conflict With the Decisions of This Court.

The parameters of judicial review of labor arbitration awards were clearly established by this Court sixteen years ago in a series of decisions known as the "Steel Workers Triology."[4] The Fifth Circuit Court of Appeals remained true to those principles in its decision below (Pet. App. A-32 to A-44). In resolving the first issue—whether the award was based upon the arbitrator's interpretation of the contract—the Circuit Court properly refused Petitioner's invitation to review the "intrinsic merits" of the award and concluded that the arbitrator had, indeed, acted within his bounds (Pet. App. A-39 to A-41). That part of the decision is so patently proper that no further discussion is here necessary. The second question of "substantive arbitrability" was likewise properly tested and resolved by the Court below. Petitioner, however, seeks to convince this Court that the test of arbitrability used by the Fifth Circuit ought only to be applied where one party is seeking to force the other to arbitrate. Petitioner contends that in post-arbitration review some other, unspecified test of arbitrability ought to be applied. The result which Petitioner seeks is contrary to all existing case law and the federal labor policy.

The test of "substantive arbitrability" employed by the Fifth Circuit was broadly set forth in *Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960), to include all circumstances in which the duty to arbitrate might arise:

---

[4] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960) and; *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.

. . .

The Congress . . . has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. . . . The judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (at 363 U.S. 578, 582-583)

In a companion decision, *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), the status of which was post-arbitration enforcement, this Court made specific reference to the tests set forth in *Warrior and Gulf* (at 363 U.S. 596). By so doing this Court implicitly rejected Petitioner's position.

Petitioner cites no cases supporting its position for none exist. Indeed, all courts have applied the *Warrior and Gulf* test without regard to whether arbitration has occurred.

The logic of applying the same test of arbitrability regardless of whether arbitration has occurred is unassailable. If different tests were used the result could be absurd. The same court using the *Warrior and Gulf* test to initially order arbitration could later be required using a second test to conclude that arbitration was not required by the contract. The parties would

thus be put by the court to futile arbitration, expense and delay. Clearly, requiring futile acts is not the function of Federal Courts.

Petitioner would have this Court enunciate a second, post-arbitration test of arbitrability reasoning that the need for the *Warrior and Gulf* test dissolves upon rendition of the arbitration award. Petitioner asserts that the *Warrior and Gulf* test of arbitrability serves to avoid strikes by submitting their causes to arbitration and that once the strike is averted the need for the test is gone. This argument falls of its own weight. If it is resolved after being initially ordered to arbitrate that the parties were not bound to arbitrate or adhere to the award, a strike could then occur and likely would occur when the smolderings of controversy are fanned by the frustration of having engaged in futile and time consuming arbitration.[5]

The Federal labor policy that favors industrial harmony is served not only by prompt submission of disputes to arbitration but also by adherence to arbitration awards once the duty to arbitrate is imposed. Having served both labor and management well for sixteen years there is no reason to disturb the *Warrior and Gulf* test now or to alter the decision of the Fifth Circuit.

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[5] If the strike was not "over" a matter subject to arbitration (e.g., not substantially arbitrable) Federal Courts may not enjoin the strike. *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970); *Buffalo Forge Co. v. United Steelworkers of America*, — U.S. —, 96 S. Ct. —, 49 L.Ed.2d 1022 (1976).

CONCLUSION

Because the decision of the Fifth Circuit Court of Appeals comports in all respects with the decisions of this Court, a writ of certiorari must be denied.

Respectfully submitted,

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